

RECENT DEVELOPMENTS

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I. Recent Cases

A. Western District

1. **In re Bernick**, Bankr. ED VA, 1/4/11: **109(e) eligibility for unsecured debts includes undersecured deed of trust debt.** Wholly undersecured deed of trust debt must be counted with unsecured debt in determining Ch. 13 eligibility. It was immaterial whether an adversary proceeding to strip off this junior lien had even been filed.
2. **In re Sara M. Travis**, #08-71735, W.D. Va. Bankr. (1/19/11 opinion, Judge Stone). **Debtor attorney fees denied for lift stay motion soon after confirmation of modified plan.** Request for debtor attorney fees for a lift stay motion 2 weeks after modified plan confirmed. Application denied b/c attorney failed to prove that legal services performed were actually necessary. Counsel's "reactive approach" to handling this case falls short of the Court's expectations for experienced Chapter 13 debtors' counsel in such matters. The modified plan he filed failed to take into account his client's mortgage arrears, and he failed to contact the creditor's attorney, which might have made the lift stay motion unnecessary. Trustee's decision to object to this \$900 fee request (on top of \$500 already awarded for the prior modified plan) is due "appropriate respect and weight." Time sheet reflects time for purely clerical or administrative tasks "which are not entitled to be compensated as professional services."
3. **In re Randall and Tina Woods**, 10-62058 (1/27/11 order by Judge Anderson). **Objection to claim based on S/L must provide evid.; "claim not listed in debtor's schedules" is not a grounds.** Debtor objected to POC: not listed on debtor's schedules; no documents to show that stat. of lim. has not run. Court held the first grounds was not relevant. For the second, the debtor had both the burden of production and of persuasion b/c the objection was based upon an affirmative defense; because he did not produce any evidence, this grounds for the object. was overruled. See Falwell decision.
4. **In re Reginald Ponton**, #10-61515 (1/27/11 order by Judge Anderson). **Second POC filed after repossession of collateral is a separate claim.** Creditor filed one claim as secured by a car; a second claim was filed by the same creditor as "supplemental" for "repossession or transport."

Debtor objected that the second claim amended the first and should be disallowed or withdrawn. Court held that the claims were not the same claim, and overruled the objection.

5. **In re George Tomaras**, #10-60785 (2/9/11 order by Judge Anderson). **“Debtor has made other arrangements to pay the claim” is not a valid grounds for objecting to a claim.** Objection to claim based on assertion that “debtor has made arrangements to pay claim outside of bankruptcy” is overruled because it is not one of the grounds listed in Code sec. 502(b).

6. **In re Charles & Christine Rector**, #09-62669 (AP# 10-06011), W.D. Va. Bankr. (03/11/11 opinion, Judge Anderson). **Debtor can still avoid a mortgage lien after he’s surrendered the property in a confirmed plan.** T sought to avoid a mortgage lien because the deed of trust was lost and never recorded. Pre-petition, MERS had filed an action in state court to impose a first-priority equitable deed of trust on the property and had recorded a *lis penden*. The debtors’ confirmed plan had surrendered the property in question, and a subsequent order lifting the stay on the real estate was entered. The matter was before the Court on cross motions for summary judgment. MERS argued that *res judicata* barred the T from administering the property, and that neither the T nor the debtor had standing.
Held: The T is not barred by *res judicata*. The validity of a lien must be resolved in an adv. proceed; plan confirmation cannot have a preclusive effect as to validity (Cen-Pen, 58 F.3d at 93), and the confirmed plan had no provision allowing MERS’ claim as to amount & character. Plan confirmation (sec. 1322 & 1325) determines how claims are to be treated, while the claims allowance process (sec. 502) determines the existence, amount, and character of each claim that is to be treated under the plan. In the absence of contrary provisions in the plan or confirmation order, the two processes are to be treated separately, and the latter process occurs after the former. Congress didn’t intend for plan confirmation to terminate the claims allowance process. The 2nd Cir. Layo case (460 F.3d 289) is distinguishable because the confirmed plan contained a provision allowing the creditor’s claim.
Held: regarding the standing issue, para. 3 only surrenders the RE to MERS *if* it has an allowed secured claim. And, in any event, even after surrender & foreclosure, the debtors (and the T as fiduciary for the unsecured creditors) retain a residual interest in the proceeds from the sale of the RE. The fact that the plan surrenders the RE to secured parties does not affect whether MERS has a secured claim.
Regarding MERS’ state court action: if MERS were to prevail, its security interest would be perfected only as of the date the *lis pendens* was filed, and the T could avoid the transfer and the security interest under 547(b) and 544(a)(3). So it is not relevant whether MERS would have prevailed in its state court action.
T’s motion for summary judgment is granted; MERS’ motion is denied.
Judgment: MERS’ lien shall be void and of no effect during pendency of the case; it shall be allowed as an unsecured claim. The lien shall be void for all purposes only if and when the debtors receive their discharge; only then can they record this judgment (with a copy of the discharge) in the state court. Upon sale of the property, the escrow agent shall pay all liens senior to the MERS claim, but shall distribute no money to MERS or any junior claim. The balance of the proceeds shall be paid to the Chapter 13 Trustee to be held in a separate account (which need not be interest bearing) pending further order of this Court. Upon the earlier of dismissal or discharge, the T shall notice all parties and the UST and request authority to distribute these funds: if dismissal, as if the MERS lien had not been avoided; if discharge, as if the lien had been avoided. [NOTE: case was appealed on 3/25/11]

7. **In re James L. Perkins**, 10-63148 (3/31/11 opinion by Judge Anderson). **Application of Va. Code sec. 34-29 to checking account funds.** In a Chap. 7 case, the Court held that the exemption contained in Va. Code sec. 34-29 applies to earnings that are subject to garnishment. It does not

protect paycheck earnings deposited by the debtor into his bank account a few days before his bankruptcy petition was filed.

8. **In re Frank & Sandra Zacchino**, # 10-62312, 4/8/11 Order by Judge Anderson. **Fact that a claim is contingent or unliquidated is not a basis for disallowing a claim.** Debtor's ex-wife filed a priority claim for child support of \$76,000. Debtor scheduled the claim at \$0 and objected to it because it was on appeal in the NY state courts. Court states that the fact that a claim is contingent or unliquidated is not a basis for disallowing a claim. 502(c)(1) requires estimation of a contingent or unliquidated claim when failure to do so would unduly delay the administration of the case; Court has an affirmative duty to do so. Debtor's request to disallow the entire claim is not appropriate.
9. [**In re Stoney**, 21 CBN 562 (Bankr. E.D. Va. 2011): **Claiming "100% of FMV" on Sch. C.** Court sustained trustee's objection to debtor's claimed exemption of "100% of FMV" on Schedule C. Held that Schwab v. Reilly does not endorse using "100% FMV" to value exemptions—such a claim is objectionable because otherwise would in effect supersede state exemption statutes.]
10. **In re Marvin & Wanda Crewey**, #11-71179, 6/28/11 Opinion by Judge Stone. **Pre-petition credit counseling session can be taken same day as filing, but must be taken before actual filing.** Debtor filed case having taken the post-petition personal financial management course, but not the required pre-petition credit counseling session. She took it the same day as filing, but two hours later. Code 109(h) has been amended to allow the debtor to take the pre-petition session on the same day of filing. But eligibility for filing is determined as of the moment of filing, so she wasn't eligible to file. Her case will be dismissed.
11. **In re Palmer & Debra Goodbar**, #09-52018, Bankr. WD Va, 6/29/11 decision by Judge Krumm. **Fees requested by debtors' counsel significantly reduced by the Court.** Debtors' attorney requested \$19,651 in fees and \$1,492 in costs in main case, plus fees & expenses of \$5,836 for an associated Adversary Proceeding. Chapter 13 Trustee and UST opposed the fee request. 4th Cir. Standard is a "hybrid of the lodestar method and the twelve factors set forth in Johnson ..." The applicant has the burden of proof. The attorney has only identified two matters that fall outside the scope of services set forth in his flat rate fee agreement of \$2,650 for specified services: the motion to sell, and the A.P. Court will award \$600 on the motion to sell because of the complexity of issues in this sec. 363 matter; the range in the WD of VA is \$250 to \$600. So his fee for the case will be \$3,250. He has failed to meet his burden of proof on the copy charges: no evidence of the number of pages copied. Court will award \$529 in expenses. (Atty only entitled to reimbursement for copies deemed necessary by the Court.) For the A.P., the Court finds that \$5,814 in fees is appropriate, based on the complexity of the issues involved. Court takes issue with the "CM/ECF Notice "charges by the paralegal; merely clerical, not reimbursable. Court does not reach the issue of whether the attorney can charge more for court time than other time, but his \$450/hr. charge is for a lawyer with his experience is "unnecessarily high"; the appropriate rate is \$250/hr. Court will reduce fee by \$487 for work performed where the description of what was done is inadequate. Court awards \$252 in A.P. costs. Final award: \$8,410 for fees and \$782 for costs; atty shall have 30 days to supplement his request for copy costs.
12. **In re Jeffrey A. Goodbar**, #10-51542, Bankr. WD VA, 6/29/11 decision by Judge Krumm. **Fees requested by debtors' counsel significantly reduced by the Court.** Fee agreement called for \$4,500 for services to be rendered by the attorney. There was a separate fee agreement for matters not covered by this fee agreement. Rates were \$250/hr out of court, and \$450/hr. in court. Atty filed application for \$7,248 + \$599.77 in costs. US Trustee objected to the fee

application. In re C & J Oil, 81 B.R. 402 (WD VA Bank. 1987) sets forth the statutory framework for fee applications. 4th Cir. Standards is a hybrid of lodestar method and twelve Johnson factors... Court finds that customary fee in Chap. 13 in WD of VA is \$2,500 to \$2,750, and that there is no evidentiary basis before the Court to justify a fee in excess of \$2,500. Only one matter falls outside the scope of the flat fee (MTLS); atty requested \$386, and Court will award \$240 (some of paralegal's entries are for clerical work). Court will award \$2,740 in fees. Re costs, records are confusing and do not say how many pages being copied, but atty can provide supplemental information to the Court w/i 20 days for those. For now, \$351.52 in costs are awarded.

13. **In re Donald and Regina Wallace**, #10-72504, Bankr. W.D. Va. (Krumm), 7/8/11 Opinion. **Court rules on specific monthly living expenses ; cigarette expense not allowed.** Ch. 13 Trustee objected to some of the debtors' expenses on Sch. J for a family of four. Held: debtors bear the burden of demonstrating that each expense is for their or their dependents' maintenance or support. \$100/mo. for grooming expenses is reasonable. \$90/mo. for household supplies was more reasonably provided for in the \$800 food or \$50 home maintenance expenses, so this expense is not necessary. \$207/mo. for child school, social activities and needs is supported by the documents provided by the debtors and is reasonable. \$152/mo. for wife's cigarettes is not necessary for support or maintenance, and is unnecessary, despite her claims that she has been unable to stop smoking. \$14/mo. for Sirius Radio is unnecessary. \$20/mo. for laundry and dry cleaning is reasonable. The Trustee's objection is sustained, and the Court finds that the debtors have an additional \$256 in disposable income.
14. **In re Cathy Knupp**, #06-50342, AP # 10-05012, 7/26/11 opinion by Krumm. **Revocation of debtor's discharge.** A case of first impression in WD of VA, Court notes. B/P is on the party seeking the revocation; all elements must be proven by a preponderance of the evidence. Must prove all 3 elements of 1328(e). (1) The one year period runs from date discharge order entered. (2) Fraud must be shown; not enough to prove equitable principles or grounds under 727(d). To prove fraud, must show debtor "knowingly and fraudulently committed an act or omission in connection with her bankruptcy proceeding, and... that the act or omission concerned a material fact." Here the debtor's knowing decision to pay off her case early in the hopes of obtaining her discharge without increasing what she had paid to her creditors was a fraud on the Court and on her creditors. The \$98,668 she received was material, so her failure to disclose it concerned a material fact. (3) The Trustee did not know of the failure to disclose until after the discharge was received. Debtor's discharge is revoked.
15. **In re Jeffrey A. Goodbar**, # 10-51542, 8/10/11 Krumm order, Bankr. WD VA. **Reimbursement for photocopying expenses.** Citing In re Wyche, 425 B.R. 779 (Bankr. ED Va. 2010), Court states that photocopying costs "incurred by an attorney in the course of acting as an attorney and thus incurred by a law firm as part of its business of offering legal services to the public" are not sufficiently necessary to render them chargeable to creditors of the estate; those that are "necessary for a particular client's bankruptcy case to proceed" are. Here the attorney failed to state why the copies were created, so the Court can't make the required determination. Therefore the attorney's request for reimbursement of these fees is denied.
16. **In re Karen Helton**, 11-60126 (Adv. # 11-06028), Bankr. W.D. VA, 8/12/11 Anderson opinion. **A Chapter 13 case filed close on the heels of a Chapter 7 case can avoid judgment liens even though the debtor is not eligible for a discharge, but confirmation of the proposed plan is denied because it was filed to avoid Dewsnup and was filed in bad faith.** Debtor is seeking to avoid 3 junior mortgage liens of creditors; Trustee is objecting to confirmation. Debtor received a Chap. 7 discharge in a case filed 7/8/09. This case was filed

1/18/11; there were no priority or general unsecured claims. The proposed plan sought to avoid the three liens and pay a dividend of 2.5% to the three lien holders as unsecured claimants.....

Long-held rule was that liens on property survive discharge. But Code sec. 506 changed that, allowing partially secured claims to be stripped down and fully unsecured claims to be stripped off. Dewsnup (U.S. Sup. Ct.) held that debtor can't strip down a lien in Chap. 7; 4th Cir. has held that can't strip off a lien either. Ryan v. Homecomings Financial Network. Dewsnup doesn't apply to Chap. 13 because of 1322(b)(2), but Nobleman (U.S. Sup. Ct.) prohibits avoidance of a partially secured lien on a debtor's residence. All five Courts of Appeal that have considered the issue have held that a debtor may use 1322(b)(2) and 506(a) to avoid a *wholly unsecured* lien. But after BAP & CPA, the issue is whether sec. 1328(f) and 1325(a)(5) combine to provide an exception to the rule in Dewsnup and Nobleman. This Court holds that 1328(f) [debtor's inability to obtain a discharge] does not prohibit the debtor from stripping off a wholly unsecured lien; "there is nothing in the Code that prohibits the debtor from avoiding wholly unsecured in rem claims even though she will not receive a discharge in this case." These claims exceed the value of the property securing them, and via 506(a) are therefore not "allowed secured claims."

Regarding the issue of confirmation, Trustee argues that the plan was not proposed in good faith. Deans v. O'Donnell (4th Cir., 1982) sets out the factors to be considered; a totality of the circumstances test. Relevant factors here are: the past filing; the nature and amount of unsecured claims; and the proposed payout percentage. Current case was filed < 6 mos. after Chap. 7 case was closed; her house and vehicle payments were current; no unsecured claims; 2.5% payout to \$176,000 in unsecured in rem claims; 36 month plan. "The sole purpose of the current case is to avoid the liens of the Defendants that she could not avoid in the Chapter 7 case." The plan was filed in bad faith it violates "both the intent and the spirit of the Bankruptcy Code in that it is a clear attempt to circumvent... Dewsnup." The Trustee's objection to confirmation is sustained.

17. **In re Edward Dunn**, # 11-60847, W.D. Bankr Ct., Anderson 8/18/11 opinion. **Debtors' attorney ordered to disgorge \$5,000 in fees received.** Attorney filed Chapter 13 for debtor in ED VA to stop a foreclosure; case was transferred to WD VA. There were numerous problems with the schedules; no disclosure statement was filed. Counsel failed to comply with the Court's deficiency orders. At a show cause hearing on 5/2, counsel said she would cure the problems. She failed to do so. On 6/21, substitute counsel was obtained and filed the correct schedules, and the plan was confirmed. At a 7/18 show cause hearing, substitute counsel proffered that the original counsel had advised the debtors to stop paying the mortgage and instead send her \$6,500. Court issued another show cause hearing for 8/15 re disgorgement of fees. Held: Applying Code 330(a): attorney did stop the foreclosure; she filed a plan "patently unconfirmable on its face"; engaged in a loan modification effort that resulted in no benefit to the debtors; schedules filed were so incomplete as to be of no benefit to the debtors; she has *still* not filed a disclosure statement. Initial counsel is awarded fees of \$1,500, and shall disgorge \$5,000 in fees received. Counsel shall pay these disgorged fees to substitute counsel within 10 days, and he shall hold them in his trust account pending further order
18. **In re Bruce & Jane Slater**, # 10-62521, Bankr. WD Va (Anderson), 09/06/11 opinion. **Debtor's attorney fee request reduced to "no look fee" amount plus hard costs advanced.** Debtors' counsel had received \$2,500 prepetition and was charging \$300/hr. for Ch. 13 case. Firm filed for supplemental fees of \$3,950 and costs of \$267. Court begins by citing the factors listed in 330(a) for evaluating such fee requests.
---Bankruptcy Courts in the WD of VA "authorize compensation on the basis of a standard "no look" fee in Chapter 13 cases." Courts are not required to award fees based on a lodestar

calculation. Most Federal Districts (80 of 92 in a 2010 survey) award no-look fees. No look fees are necessary “for efficiency reasons,” and they “reflect the standard set forth in 330(a)(3).” “While each Chapter 13 case may have some nuance, virtually all consumer bankruptcy cases concern the same set of tasks at approximately the same level of complexity. Consequently they should consume approximately the same amount of time and skill and experience on the part of the attorney.” The huge number of cases filed in this division in the past ten years shows that the no-look fee represents the market rate.

---The fact that the debtors agreed to the requested fees “is not determinative”: Congress placed limits on such fees by enacting sec. 329 and 330.

---Court disagrees that this case required more than the usual amount of time and expertise. No adversary proceedings; Trustee testified he didn’t see anything unusual here. The no-look fee is appropriate in this case.

---In any event, the requested fees could not be granted under the lodestar method due to “the disorderly nature of the application.” 4th Cir. has adopted the 12 factor test of the 5th Cir. Johnson case. The Johnson factors should be considered in initially determining the lodestar figure, not in adjusting that figure upward; the novelty and complexity of a lawsuit should not be used to increase the basic fee award, as the special skill & experience required will be reflected in the hourly rate applied. Daly v. Hill, 790 F.2d 1077 (4th Cir. 1986), citing Blum v. Stenson, 465 US 886 (1984).

--Attorney’s requested fee is high for someone in the WD of VA with his experience (chart showing that average fee awarded by the Court is \$245/hr and average experience was 22 years). An appropriate rate for this attorney would be \$200-\$225/hr; Court will allow a fee of \$225/hr. Court cannot discern the amount of time spent on individual tasks “given the severe extent to which tasks are bundled.” Court will allow 1.6 hours for client consultation. For the time spent on schedules and pleadings (16.78 hours), the number includes clerical tasks billed at attorney’s rates; the Court cannot ascertain the magnitude of the required adjustment, but it should not have taken more than 7-9 hours. Re travel, amounts were again bundled; one client should not bear the entire brunt of travel expense; and 1 hour will be allowed. Total time allowed would be 10.2-12.2 hrs x \$225/hr = \$2,295 to \$2,745. So the lodestar analysis confirms that the no look fee is appropriate.

---Re reimbursement of expenses: out of pocket expenses will be allowed, but copying and postage are included in the no-look fee.

---Total compensation to be allowed: \$2,500 in fees and \$871 in expenses.

19. **In re Jason & Nicole Robertson**, # 10-51260, Bankr. Ct., W.D. Va., 9/9/11 Krumm opinion. **Second vehicle purchased under a credit union loanliner agreement is subject to a PMSI and cannot be crammed down.** Debtors executed a loanliner agreement with the DuPont Credit Union; the agreement provided that any advances would be secured by the vehicle being purchased and by future collateral as well. Debtors bought a Kia in 2007 and a Ford in 2009 on this account. Issue: did the advance to purchase the second vehicle constitute a PMSI, or can it be crammed down because the collateral consisted of more than the car being purchased? Held: it constituted a PMSI and cannot be crammed down. (1) The second loan is a separate and distinct loan; not merely “part of a larger umbrella lending arrangement.” (2) The “lending disbursement receipt” constitutes a valid and enforceable security agreement under VC 8.9A-102(23). (3) The latter advance is covered by a PMSI even though the underlying agreement contains a cross-collateralization provision, but the creditor can only assert a PMSI against the second car under the terms of the second advance.
20. **In re Alan & Amy Askew**, Bankr. Ct. W.D. Va., #09-60155, 9/15/11 Opinion (Anderson). **Trustee will not be compelled to recover and redistribute properly-distributed funds in re-opened**

case. Debtors had modified their confirmed plan to provide for the payment of post-petition income taxes. The debtors paid off their case early. Because the IRS never filed a claim, the case was closed without any payment by the Trustee to the IRS. The debtors received their discharge and the case was closed in the normal course. A month later the debtors reopened their case and moved to compel the Ch. 13 Trustee to recover funds previously (and properly) distributed so that the money could be re-distributed to the late-filed IRS claim. After the case was reopened, the IRS filed a claim for the post-petition taxes. The Trustee objected to the claim as not timely. *Held: the IRS claim is disallowed, so the Trustee has no authority to pay that claim, and there is no reason to compel him to recover previously distributed funds.*

---Even though a confirmed plan provides for payments on a claim, the creditor is not entitled to receive a distribution unless it has filed a timely proof of claim.

---sec. 1305 does not prescribe when a claim must be filed under that section; normal deadlines do not apply.

---The Trustee has sufficiently pled the elements of the defense of laches: unreasonable delay and prejudice to the party raising the defense. The Court agrees: the Trustee “administered this case in compliance of law. He should not be compelled to incur time and expense to correct a situation that was not of his own doing.”

---The request of the debtors to hold this case open so that they can file another modified plan to pay this tax claim is denied; this goal would be better served by their filing a new petition.

B. Fourth Circuit

1. **In re Anne L. Botkin**, ___ F. 3d ___ (4th Cir. , 6/13/11; # 10-1681) [CA 5:10CV00018, U.S. Dist. Ct. WD VA (5/17/10 opinion, Conrad)]. **Sec. 522 lien avoidance does not require the filing of a Homestead Deed.** (Fourth Circuit upholds the District Court opinion.) Debtor filed a Homestead Deed in her Chap. 7 case, but did not exempt any equity in her home. She then tried to avoid a judgment lien on the property. Issue: can a debtor avoid a judicial lien under sec. 522(f)(1) without claiming an exemption in the property subject to the lien. Citing Owen v. Owen, 500 U.S. 305 (1991), Court says the issue is “not whether the lien impairs an exemption to which the debtor is in fact entitled, but whether it impairs an exemption to which he would have been entitled but for the lien itself.” The Code “plainly provides that debtors need not claim an exemption as a precondition of avoiding a lien that the debtor contends impairs that exemption.” Court rejects creditor’s arguments that this will “deny creditors the right to object” ; that the court will be “unable to determine the amount of the exemption at issue or whether the exemption is impaired”; and that this will allow the debtor to “gain all the benefits of 522(f) without having to bear the consequences of having to use her limited exemptions.”

C. Supreme Court

Stern v. Marshall, ___ U.S. ___, 2011 WL 2472792, 6/23/11. **A counterclaim against a creditor asserting a claim is a core proceeding under § 157(b)(2)(C), but Congress’ delegation of jurisdiction over such claims to a bankruptcy court (which is not an Article III court) is unconstitutional.**

Vicki Lynn Marshall, also known as Anna Nicole Smith, married Howard Marshall shortly before his death. When Mr. Marshall, reputed to be one of the wealthiest men in Texas, passed away, his will left nothing to Vicki, and Vicki asserted that Marshall’s son, Pierce, had prevented her from receiving

an *inter vivos* gift before Marshall passed away. Vicki filed an action in Texas against Pierce because of the interference. When Vicki filed bankruptcy in California, Pierce filed a claim for defamation and asserted that his claim was nondischargeable. Vicki challenged the claim and pursued a counterclaim against Pierce for his interference in her receiving the gift from Marshall. The probate court in Texas determined that there was no tortious interference and that Vicki had no claim against Pierce. The bankruptcy court, however, concluded that Vicki had a valid claim and awarded her in excess of \$44 million on her counterclaim.

The claim which Vicki raised against Pierce was a counterclaim and, under a strict reading of 28 U.S.C. § 157(b)(2)(C), the counterclaim was a “core proceeding,” giving the bankruptcy court full jurisdiction to consider it. The statute confers upon bankruptcy judges the authority to hear and enter final judgments in all core proceedings arising under Title 11 or arising in a case under Title 11, specifically “counterclaims by the estate against persons filing claims against the estate.”

The Supreme Court held, however, that in crafting the jurisdiction of the bankruptcy court, Congress went too far. Bankruptcy judges are not appointed by the president, not confirmed by the Senate, do not hold lifetime tenure and do not have a protection against reduction in compensation during their tenure. Thus, they are not “judges” under Article III. The counterclaim raised by Vicki was a state law action that had origins independent of federal bankruptcy law and could not necessarily be resolved by a ruling on Pierce’s proof of claim. Congress cannot constitutionally withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, equity, or admiralty. The action raised by Vicki was, at its very heart, a tort action and was a state common law action between two private parties. *Northern Pipeline* established that “Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants.” Similarly, Congress cannot vest in a non-Article III court the power to render a final judgment in a tort action. “What is plain here is that this case involves the most prototypical exercise of judicial power: the entry of a final, binding judgment by a court with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime. If such an exercise of judicial power may nonetheless be taken from the Article III judiciary simply by deeming it part of some amorphous ‘public right,’ then Article III would be transformed from the guardian of individual liberty and separation of powers we have long recognized in mere wishful thinking.”

In ruling on the counterclaim, the bankruptcy court was required to and did make factual and legal determinations that were not part of passing on or considering objections to Pierce’s proof of claim. There was, however, no reason to believe that the process of adjudicating Pierce’s proof of claim would necessarily resolve Vicki’s counterclaim. “The only overlap between the two claims in this case was the question whether Pierce had, in fact, tortuously taken control of his father’s estate in the manner alleged by Vicki in her counterclaim and described in the allegedly defamatory statements.”

It should be noted that, in ending its opinion, the majority stated that “[t]he Bankruptcy Court below lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor’s proof of claim.” Thus, the majority seemed explicitly to limit its holding to cases in which the claim and counterclaim would not be resolved by the same judicial inquiry necessary to the proof of claims process. The unrestricted conferring of jurisdiction on counterclaims which a debtor may have against a claimant is clearly unconstitutional.

AmeriCredit Financial Services, Inc. v. Penrod, #10-1443, 10/3/11, 79 USLW 3686. **Negative equity in a car loan is not purchase money for purposes of the hanging paragraph in sec. 1325.** The Supreme Court denied the petition for certiorari. This leaves standing the decision by the Ninth Circuit that “negative equity” in a car loan is the financing of preexisting debt that is not purchase money for purposes of the hanging sentence at the end of § 1325(a)(5). See *AmeriCredit Fin. Servs., Inc. v. Penrod*

(In re Penrod), 611 F.3d 1158 (9th Cir. July 16, 2010).

II. **New Western District Local Rules**

- A. **1/10/11:** You will find an order which amends the certification to be filed in conjunction with Local Rule 4004-2 (Chapter 13 Debtor's Certification of Compliance with 11 U.S.C. 1141 – request for discharge)
- B. **6/1/10:** Local Rule 3001-1 was recently amended to allow non-CM/ECF users to file proof of claims over the internet simply by clicking on the link on the left side of the page. Claims Filers are able to:
- file from their home or work computer
 - file with no CM-ECF login or password required
 - print a copy of their filed claim immediately
 - access online help that is just a mouse click away
 - easily attach supporting documents
 - file anytime day or night

III. **New Western District Standing Orders**

- A. 4/1/10: Standing Order # 12 (Orders resolving motions to lift stay): implementation date of the Order is “..DEFERRED pending further order of this court.”

IV. **Changes in Western District Court Policies and Procedures (Judges Anderson and Krumm)**

- A. New plan paragraph 11 language re the filing of unsecured deficiency claims by creditors to whom collateral is being surrendered in paragraph 3 (7/11/11): Both Judge Anderson and Judge Krumm are now allowing standard language to be added to the form plan that limits the time within which a creditor may file an unsecured proof of claim for a deficiency on property being surrendered pursuant to paragraph 3.B. of the plan.

This language will provide certainty and closure in situations where debtors must pay 100% of claims or want to pay off their plan early.

The following language (or something comparable) can be inserted into paragraph 11 of the plan. If you add this language, you need to state clearly in paragraph 3.B. that the creditor also needs to look at paragraph 11.

“Any unsecured proof of claim for a deficiency which results from the surrender and liquidation of the collateral noted in paragraph 3.B of this plan must be filed by the earlier of the following dates or such claim will be forever barred: (1) within 180 days of the date of the first confirmation order confirming a plan which provides for the surrender of said collateral, or (2) within the time period set for the filing of an unsecured

deficiency claim as established by any order granting relief from the automatic stay with respect to said collateral.

Said unsecured proof of claim for a deficiency must include appropriate documentation establishing that the collateral surrendered has been liquidated, and the proceeds applied, in accordance with applicable state law. “

- B. Increase in initial fees for debtors’ attorneys. Both Judge Anderson and Judge Krumm will now allow, without the need for contemporaneous time records, a fee of \$2,750 for debtor’s attorney’s fees through confirmation. For Judge Anderson, this is an increase of \$250 from the “no look” fee he was allowing since November, 2005, and applies to all cases filed after August 1, 2011. Judge Krumm has been allowing this amount for some time as long as the Trustee was not objecting.

V. Changes in Trustee Policies and Procedures

A. Changes in Court Preparation for Charlottesville and Lynchburg (3/21/11)

We have instituted some changes in the way we prepare for Court in Lynchburg and Charlottesville, and I wanted to explain our new process. These new procedures will be used beginning with the Charlottesville Court docket on March 21st. If you have any questions about any of this, feel free to call me.

PLEASE SHARE THIS INFORMATION WITH YOUR STAFF.

1. E-mails from my Case Administrators:

- A. In each case involving confirmation of an initial or modified plan, a motion to dismiss, or a status hearing, a Case Administrator (“C.A.”) will send to your office prior to Court an e-mail detailing (i) our recommendation to the Court, (ii) if applicable, what statements will be read into the record in Court (e.g., confirmation order other provisions), (iii) if applicable, the items that we believe must still be completed for a case to be ready or our motion to be resolved, and (iv) if applicable, a proposed continued Court date.
- B. If your office does not respond to that e-mail, we will assume that you are in agreement with what we’ve said. If there is any question about the e-mail address we’re supposed to be using, please advise the C.A. right away. [Attached is a current chart of the phone number and e-mail address for each of my staff members.]
- C. If you don’t agree with the contents of the e-mail, please respond promptly to the C.A. to state your position and to see if she can assist you in resolving the matter prior to Court. When you respond, please make sure the subject line of the e-mail contains the debtor’s name, the case number, and the Court date.
- D. We retain each of the e-mails—the ones we send and your responses—in an Outlook subdirectory, stored by case number, so that we have easy access to them at any time.
- E. There is no change in this part of the process from what we’ve been doing over the past year.

2. Pre-Court phone call from the Trustee:

- A. I will continue to call debtor attorneys a day or two before Court to discuss only those cases in which (i) I am asking dismissal and you have not previously indicated that the debtors are not opposing my motion; (ii) there are still issues that need resolving (disposable income; Chapter 7 test; etc.); or (iii) there is a question about what the continuation date should be.
- B. As has been the custom, you are free during this call to bring to my attention any cases you need to discuss.

C. There is no change in this part of the process from what we've been doing over the past year.

3. Exhibit A for continued cases:

- A. In Court I will still hand out the Exhibit A for cases that are being continued **with conditions**
- B. I will no longer hand out the Exhibit A in cases that are being continued **with expectations**. The last e-mail sent to your office by the C.A. will contain the next Court date and all those items that still need to be completed, and we have realized that the Exhibit A in these cases is nothing but a less-detailed duplication of the e-mail.

4. Annotated Court Docket:

- A. Instead of the (huge) 3-ring Court notebook that I have brought to Court for years, we are now preparing for each Court day an annotated version of the Official Court Docket that Barbara Okes prepares each time. Beneath each case there will be a space that will contain (i) my recommendation to the Court; (ii) any statements that must be read into the record (e.g., other provisions in confirmation orders); and (iii) if the case is being continued, the continuation date.
- B. My office will send to each attorney with cases on the docket a work-in-progress copy of our annotated docket a few days prior to the Court date, and a final version the day before Court. (Since we only get Barbara's final version of the Court Docket about seven days before the Court date, we won't be able to send the first version any earlier than that.) If on that first version there are no notes for one of your cases, it just means that we haven't reviewed that case yet. The first version may also contain summaries of issues that I am still in the process of reviewing or resolving.
- C. We will send you the annotated docket in RTF format, which means that it will be totally searchable as if it were a Word document. For example, if you wanted to find a case by either name or case number, you would hit "Control F" [if you're using Word; it may be something else if you use a different word-processing program] and then type in the case name/number.
- D. I will have with me in Court a complete history of each case, including payment history and filed claims, but it will be on my laptop instead of on paper.

- B. New "Order Resolving" form: In May, 2010, and again in November, 2010, we sent out to all debtor attorneys the following notice, with attached forms and explanations. This form is Form #23 on the list of standard forms in the Debtor Attorney Information section of the website.

For several years now we have been using--primarily in Judge Anderson's Court, but also more recently in Judge Krumm's Court--two orders that have allowed minor, non-prejudicial changes to a confirmed plan without having to file an amended plan. The first order, which we called the "*order resolving*," allowed the curing of a plan payment default by increasing the monthly plan payments for the balance of the term of the most recently confirmed plan; it allowed the plan to finish in the existing term and pay the same total of payments. The second order, which we called the "*order extending*," allowed minor additional payments to the plan to take care of last minute or unprovided-for claims; in such cases the total of plan payments and the length of the plan were increased. These orders have proven to be time-saving devices.

However, as with most such experiments, we have realized that the process could be improved: having two forms is a bit confusing, and the wording of the motion and order needed to be a bit clearer. So we have, with the Court's permission, combined the two orders into one. The new

motion and order are “check the box” forms to a large extent, and we believe that you will find them easier to use. To keep things simple, we just call this order an “order resolving.”

Attached you will find:

1. A sample of how the new order and motion might look if being used to cure a plan payment default, with suggested language in red;
2. A sample of how the new order and motion might look if being used to increase payments to provide for a late filed claim, with suggested language in red;
3. A short memo explaining some of the uses to which the new order and motion might be put; and
4. A “clean” RTF formatted version of the motion and order for use by you and your staff.

Remember, these forms are only to be used when making a change to a confirmed plan which will have *no* impact or a *de minimis* impact on existing creditors, as that term is defined in paragraph 2.B. of the motion. If there will be any prejudice to creditors, an amended plan will have to be filed and noticed.

Feel free to call me, Angela, or RC if you have any questions about any of this.

C. Loan Modifications: Judge Krumm requires 15 days notice to all creditors and the Trustee, and will allow negative noticing if the attorney certifies in the motion that there is no prejudice to creditors. Judge Anderson only requires that the Trustee be noticed. Both require that the Trustee endorse any order approving the modification. The Trustee asks that the loan modification agreement be attached to the motion, and that the motion state the following: the change in monthly payment, interest rate, and principal balance; the total of any fees and charges being assessed against the debtors; the amount of arrears being included in the new loan; and the amount of any cash being received by the debtors. Attorneys should review Local Rule 6004-3 regarding sale or refinance of property post-confirmation.

If under the confirmed plan the Trustee was paying pre- or post-petition arrears to the mortgagee, the order must also contain the following language:

“The Trustee shall make no further payments to this creditor on the arrearage portion of its secured claim after the date on which this Order is entered. This provision supersedes any language to the contrary in the confirmed plan and/or the Confirmation Order. The amounts paid to this creditor by the Trustee through the date of this Order on the arrearage portion of the creditor’s secured claim are hereby approved. If the Debtor defaults under the terms of the loan modification being approved herein or wants the Trustee for any other reason to resume making arrearage payments to this creditor, the Trustee will not be able to resume making payments to this creditor on the arrearage portion of its secured claim until either (i) a modified plan reinstating such payments has been confirmed by the Court, or (ii) the Trustee has been instructed to resume such payments by other order of this Court. “

D. Closing of cases without a discharge being issued: Pursuant to Local Rule 4008-1, once the Trustee has certified to the Court in a BAP & CPA case that the debtors have completed their plan payments, the Court will issue to the debtors a "Notice to File Certification of Compliance with 11 U.S.C. sec. 1328." The

debtors will then have 60 days to execute and file with the Court and the Trustee the "Debtors' Certification of Compliance with USC §1328" form that accompanies this Local Rule and which can be found on the Local Forms section of the Court's website, Form 4008-1A. In this Form the debtors are certifying, among other things, that they have taken the personal financial management course required by Code §1328(g). If the debtors fail to file the required certification form within the 60-day period, the case may be closed by the Court Clerk's Office without the issuance of a discharge. At present, the Court's policy is to close such cases without a discharge 30 days after the expiration of the 60-day period. The Court may, in some instances, allow the reopening of a case for the purpose of complying with this certification process.

- E. Car ownership expense on Lines 28 and 29 of Form B22C: If the debtor cannot claim a car ownership expense on a vehicle because there is no loan payment on it as of filing, the Trustee will not object to the debtor taking an "old vehicle allowance" of \$200/mo. if as of filing the vehicle is either six years old or has 72,000 miles on it. This allowance is limited to one vehicle per debtor, and is only applicable if the debtor is not already claiming a car ownership expense on another vehicle.
- E. Debtor's affidavit regarding disposable income issues. The Trustee has developed a form affidavit [**Form #20A** on the list of forms in the debtor attorney section] for use by debtors' attorneys when the Trustee has retained his disposable income objection after initial confirmation and there are post-confirmation hearings involving changes (or lack of changes) in a debtor's employment situation or disposable income. The use of this affidavit can sometimes resolve the Trustee's concerns and negate the need for further hearings. See section V. G. 2. of the debtors' attorney section of the website.

VI. Changes to Bankruptcy Code or Federal Rules of Bankruptcy Procedure

A. Changes to Means Test Numbers

Effective for cases filed after 3/15/11, the means test numbers are being adjusted to account for inflation. Below is the address to the UST website that will provide you with the new numbers.

<http://www.justice.gov/ust/eo/bapcpa/20110315/meanstesting.htm>

VIII. Miscellaneous

A. INTERNAL REVENUE SERVICE: CHANGE IN ADDRESSES:

Effective 1/1/11, Correspondence pertaining to bankruptcy cases should be sent to:

Internal Revenue Service

P.O. Box 7346

Philadelphia PA 19101-7346 (replaces P.O. Box 21126)

Effective 1/1/11, Overnight mail should be sent to:
Internal Revenue Service
2970 Market Street
Mail Stop 5-Q30.133
Philadelphia PA 19104-5016

Toll free number will remain the same: 800 913 9358

Fax number being changed to: 267 941 1015

If any questions, call 1 800 913 9358

Once a debtor files a bankruptcy case, all Federal income tax returns are filed by mailing them directly to: Internal Revenue Service, Insolvency Units, 400 N. 8th Street, Box 76, Richmond, VA 23219-4838 [4/5/11 IRS notice]

B. IRS Announces Changes to Lien Process (2/24/11)

<http://www.journalofaccountancy.com/Web/20113894.htm>

The IRS has announced a set of new policies designed to help taxpayers pay their back taxes and avoid liens (IR-2011-20). The changes to the IRS' lien filing practices include:

- Increasing the dollar threshold above which liens are generally filed.
- Making lien withdrawals easier after the taxes have been paid.
- Withdrawing liens in most cases when a taxpayer enters into a direct debit installment agreement.

The IRS also announced that it is making it easier for taxpayers to enter into an installment agreement and is expanding its streamlined offer in compromise program.

The IRS uses liens to establish a legal claim to a taxpayer's property when the taxpayer has an unpaid tax debt; once filed, a lien gives the IRS priority over certain other creditors. While under IRC §6321 a tax lien automatically arises when a taxpayer fails to pay taxes due after a notice and demand for payment from the IRS, the IRS will file a lien when a taxpayer's past due balance exceeds a certain dollar amount. The IRS announced that it will "significantly increase the dollar thresholds" above which liens are generally filed; however, it did not announce what the new threshold would be. The Internal Revenue Manual currently calls for the automatic filing of a lien for unpaid balances above \$5,000 (IRM §5.12.2.4.1).

Under the new procedures, the IRS will withdraw a lien once the taxpayer has fully paid the taxes due, if the taxpayer requests it. The IRS also says that it will streamline its internal procedures to allow collection personnel to withdraw liens.

For unpaid assessments of \$25,000 or less, the IRS will allow lien withdrawals if the taxpayer enters into a direct debit installment agreement or converts a regular installment agreement to a direct debit installment agreement. The IRS says it will also withdraw liens on existing direct debit installment agreements upon taxpayer request. There will be a probationary period before the lien is withdrawn to satisfy the IRS that the direct debit payments will be honored.

Installment Agreements and Offers in Compromise

Currently, only small businesses with under \$10,000 in liabilities can participate in the IRS' streamlined installment agreement process. The IRS is raising the maximum to \$25,000. Small businesses will then have 24 months to pay off their tax debt.

Finally, the IRS is expanding a new streamlined offer in compromise program to allow taxpayers with annual incomes up to \$100,000 to participate. The tax liability maximum is being raised from \$25,000 to \$50,000.

C. 04/22/11: Updated info re IRS Special Procedures office in Richmond:

Linda Kormylo in Richmond (804 916 8063) to get the correct story:

--The Richmond office of Special Procedures used to handle all Chapter 13 cases in the WD of VA, from beginning to end, but its responsibilities have changed.

--The Richmond office still reviews, and is responsible for, all Chapter 13 cases from the WD of VA from filing through confirmation. It files the proof of claim in each case.

--After confirmation, the case is sent to the Philadelphia office.

--Any issues regarding post-confirmation plan payments by the debtors will be dealt with by the Philadelphia office.

--If any issues arise regarding post-confirmation taxes, the case will be sent back to Richmond and the Richmond office will handle the matter.

--Debtors or attorneys can always call the toll free number in Philadelphia (800 913 9358) if they have questions about a case; that office can answer most questions, and will refer the case to Richmond if need be.

D. 04/28/11: Service of process on corporations and financial institutions: helpful hints:

TO serve an insured institution, Bank:

First go to the FDIC web site: http://www2.fdic.gov/idasp/main_bankfind.asp

to find out if the bank is insured (you only need to fill in the name, it will give you choices) This will tell you if the bank is insured, if there is a successor institution, and give the "official address".

Second: google the bank name and "investor relations" or "corporate governance". The list of the Board of Directors including the CEO should appear on a letter or in the yearly report. (I serve the CEO at the official address by certified mail, then any other address - from a proof of claim etc)

TO service an insured institution, Savings and Loan:

First go to the OTS web site: <http://www.ots.treas.gov/?p=InstitutionSearch> to find out if S&L is insured (you only need to fill in the name, it will give you choices) This will tell you if the S&L is insured, if there is a successor institution, and give the "official address"

Second: google the S&L name and "investor relations" or "corporate governance". The list of the Board of Directors including the CEO should appear on a letter or in the yearly report.

TO serve a corporation:

Every state has a secretary of state which maintains a web site. In Florida it is <http://www.sunbiz.org/search.html> You can search by Name of the Corporation. (I also use this site to find out if the debtors have additional corporations) This will provide you with the name of the registered agent. If the Corporation is not registered in your state and have filed a proof of claim check the Secretary of State from the proof of claim address. The other favorite is <https://delecorp.delaware.gov/tin/GINameSearch.jsp> (Delaware - the haven for most large corporations)